Before the
Federal Communications Commission
Washington, D.C. 20554

In re Maritime Communications/ Land Mobile LLC, DIP ("MCLM") and Choctaw Holdings LLC ("Choctaw") Assignment of License Authorization Applications: now in the name of "assignor" Choctaw, filed initially by assignor MCLM Assignment Applications to Duquesne Light Company and Rappahannock Relevant dockets Call Signs WQGF316, WHG750, WQGF315		DA 18-147 Public Notice No. 12484. 08/02/2017 File Nos. in the Public Notice: 0004030479, 0004193328, 0004430505, 0004507921, 0004604962, 0005224980, 0006967374 File Nos. 0004315013 and 0006967374 Dockets: 11-71, 13-85

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PETITION FOR RECONSIDERATION
Errata Copy[1]

To: Office of the Secretary
Attn: Chief, Wireless Telecommunications Bureau

Warren Havens
and
Polaris PNT PBC

2649 Benvenue Ave
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March 16, 2018

[1] Filed March 17, 2018. Additions in boxes; deletions in strikeout; some indentations changed.

Warren Havens ("Havens") and Polaris PNT PBC ("Polaris") (together, the "Petitioners") hereby submit this petition for reconsideration (the "Recon") of the above-captioned Bureau Order, DA 18-147, released February 14, 2018 that denied Havens' 2010 and 2015 petitions to deny and dismissed Petitioners' 2017 Petition (together, the "Petitions")[2] (the "Order" or the "Decision") The Decision states that it responds to petitions in years 2010, 2015, and 2017 that each involve Havens, and the 2017 Petition also involves Polaris.

For reasons given herein, Petitioners request that the FCC reverse its various denial and dismissal decisions in the Decision, and grant the above-noted three Petitions in full.

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[2] The defined terms used herein have same meaning as in Petitioners' petition to deny filed in 2017 that was dismissed by the Order.

Introduction and Summary

Initially, herein, the "FCC-D" means the person(s) and delegated authority(ies) that constructively decided on and released the Decision and related matters: It is not clear who those persons are in the circumstance including (i) the ex parte rule violations that Petitioners assert, and (ii) the Decision's rationale that it alleges to follow and implements the Commission's "Second Thursday" decision of December 2016 but where, Petitioners assert, that 2016 Ddecision cannot reasonably be deemed to authorize any persons in the Wireless Bureau to decide on and issue the Decision; and "FCC-S" means FCC staff responsible for FCC 15M-14.

The substantial descriptions used in the section headers, listed in the Table of Contents above provides a sound summary.

Tolling, and Reversible Error, Due to the "Sippel Order" (FCC 14M-15 FCC 15M-14) Being Invalid as to Process, Substance, Law, and Time that Passed

Petitioner first points out here that the FCC-S (defined above) has sat on (did not in any act upon) his appeals of the Sippel Order, FCC 15M-14, in Docket No. 11-71, for almost 3 years to this time, while at the same time, the FCC-D has expeditiously processed and decided upon various Maritime and Choctaw matters, including denials or dismissals of Havens' challenges.

This constitutes extreme impermissible unequal treatment and other Due Process violation rendering the disparate treatment and the ramifications, including the FCC-D alleged Petitioners' loss of Standing, and the Decision, void. It could not be more clear that the Sippel Order and Appeals therefrom were filed due to the Sippel Order containing and being based upon actions in a formal hearing that gave rise to the right to appeal an interlocutory decision by a FCC administrative law judge without permission of the judge: All those appeals *as a matter of right* are provided for in FCC rules (and like rules of other authorities) because the matters being appealed must be decided by the Commission promptly -- at that stage in the hearing -- because

they affect the rights of the subject(s) of the decision in the hearing (and thus and may also affect others parties' rights and obligations), as well as the course of the hearing, and without a prompt decision, a later decision can be good cause for the subject of the decision to challenge the events in the hearing that took place after that stage ~~at such later decision time~~.

Thus, given that close to three years has passed, and the hearing has even been terminated, the ~~Commission~~ FCC-S sitting on the Sippel Order appeals is invalid, highly prejudicial and damaging to the appellants, and to any valid 11-71 proceeding and its results. At least upon the termination of the 11-71 proceeding, that took place in mid-year 2016, the Commission (or its OGC), over the FCC-S, should have acknowledged that the ~~Sipple~~ Sippel Order, if ever it had any procedural issue or substance worth review, was impermissibly stale and void, under fundamental Due Process. Due Process requires a notice or fair warning, and a hearing, suitable for the issues before the government, and here, as just summarized, the extreme delay, by itself, is lack of required Due Process rendering the ~~Sipple~~ Sippel Order and its results void.

In addition, the Sippel Order is the basis for the Receivership over the FCC license entities formerly controlled by Havens- according to the Receiver and others at times.[3] Petitioner Havens believes the FCC-S's inaction on his appeals of the Sippel Order is intentional, so that the FCC-D can, as it has been doing since the receivership took place, proceed to dismiss Havens' meritorious MCLM-related challenges as moot for alleged lack of standing due to the receivership,

[3] However, the Judge that created and governs the receivership did not state in creating it why he did so, and even this year he stated that even the Receiver does not know his reasons. In any case, it is impermissible for any court or legal authority other than the FCC to take action reserved for the FCC including any action that only the FCC may take, including as a result of the Sippel Order, to cause a transfer of control in the licenses and licensees involved in the Sippel Order- which was Havens. If the plaintiff who sought the receivership wanted to do that, the sole authority to address was the FCC. Havens thus asserts that, for this and other reasons, the receivership is subject to FCC preemption and is void *ab initio.* Where the FCC indicates something like the reverse—that the FCC should take direction on its own licensing and adjudication matters to a proceeding by an outside legal authority, it violates the mandates of the Communications Act as to its exclusive jurisdiction and obligations and field and express preemption.

which is an alleged result of the ~~FCC's~~-Sippel Order. That is the FCC-S is choosing to avoid addressing the appeals of the Sippel Order in order to maintain the receivership situation that in turn allows the FCC-D to argue that Havens has lost all interest and standing and therefore proceed to dismiss or deny ~~all of his~~ Petitioners' challenges and ~~proceed to~~ uphold or grant windfall boons ~~relief~~ to MCLM, Choctaw and assignee parties. Havens believes that this corrupts all of the FCC's actions against Havens and his interests including since the receivership was allegedly entered due to the Sippel Order, and thus those boon decisions will be subject to reversal and findings of *void ab initio*, if the appeals of the Sippel Order are ultimately successful, or the receivership is found to lack jurisdiction due to FCC-law preemption (or other reasons).

Exhibit A contains a copy of the Court of Appeal of the State of California, First Appellate District, Opinion affirming the Receivership Order, filed August 23, 2017 (the "Court Opinion"). The Court Opinion makes clear that the Court of Appeal of the State of California ("COA") found the interlocutory Sippel Order, FCC 15M-14, to be sufficient apparent cause for the lower court to issue a receivership over the companies that Havens had previously managed.[4] At pages 12-13 the Opinion states (underlining added):

> Havens has not shown an abuse of discretion under either California law or Delaware law. Havens insists the trial court erred by appointing a receiver because revocation of the Receivership Entities' licenses was *not* imminent after the Sippel Order. Even if we assume that Havens is correct that imminent risk of harm is required under Delaware law (*Berwald v. Mission Development Co.* (Del. 1962) 185 A.2d 480, 482), Havens's argument fails. Havens argues there was no imminent risk of harm because revocation of the Receivership Entities' licenses would be possible only after a contested hearing before the full Commission (47 U.S.C. § 312; 5 U.S.C. §§ 554, 558), and that "[n]o revocation hearing . . . could take place for a very long time." But under Jefferson Radio Co. v. Federal Communications Com. (D.C.Cir. 1964) 340 F.2d 781, a licensee is prohibited from transferring a license while a proceeding that might lead to license forfeiture is pending. (Id. at p. 783.) Thus, Leong is correct that the Receivership Entities' ability to freely transfer its licenses would be jeopardized if the FCC determined a qualifications hearing was justified. At the time the Receivership Order was entered,

[4] This issue of *state* law, and other parts of this COA decision (including some facts alleged), are among the aspects of this *state-court* receivership pending challenge by Havens *under federal law* in *Havens v. Becerra* (USDC, ND California, filed 2017). See, e.g., 2017 U.S. Dist. LEXIS 209390 (OSC to the defendant, the California Attorney General). This case including the OSC is initially concerned with ¶¶ 4 and 5 on p. 4 of Exhibit B hereto.

> evidence showed a hearing designation order could issue at "any time" and would be catastrophic for the Receivership Entities.
>
> To invoke the authority to appoint a receiver under Code of Civil Procedure section 564, subdivision (b)(1), the plaintiff must establish a "joint interest with [the] defendant in the property; that the same was in danger of being lost, removed or materially injured, and that plaintiff's right to possession was probable." (Alhambra-etc. Mines v. Alhambra G. Mine, supra, 116 Cal.App.2d at p. 873.) Although the parties vehemently disagree regarding Leong's precise ownership share, there is no legitimate conflict in the evidence.16 Havens makes a wholly unsupported argument that Leong has no interest, but the record undisputedly shows Leong has a joint interest in Telesaurus and Verde. Leong also presented evidence showing he has a probable joint interest in the other Receivership Entities. Given Leong's probable interest in the Receivership Entities, we fail to see any abuse of discretion in the trial court's decision to appoint a receiver to protect Leong's interests from the danger they faced as a result of Havens's misconduct before the FCC.

~~The~~ This state-court, temporary receivership[5] which the FCC-D argues has permanently taken away Havens' federal-law interest and standing to challenge MCLM and Choctaw, is based upon the FCC-S's Sippel Order, which has been pending appeal for almost 3 years. The FCC has not indicated in that period that it was going to take any action based on ~~Judge~~ the Sippel~~'s~~ Order's referral. ~~; however, t~~ The FCC-S has effectively skirted Havens' Due Process and First Amendment rights, by ~~allowing~~ providing invalid grounds for a ~~the State of~~ California court to issue and maintain a receivership based, according to the party that sought and maintains the receivership, on ~~a~~ this referral by Judge Sippel that is subject ~~to~~ solely to FCC jurisdiction.

The FCC is subject to holdings of the US Supreme Court applicable to the FCC. This includes *Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120 (1945) (also cited earlier) that bars any assertion that Petitioners cannot address the FCC on any matter related their claims of private and public interests in any licensing or other proceeding or matter before the FCC.

For reasons herein, Petitioners assert that the subject FCC-D decisions including the Decision are subject of reversible error and tolling applies to Petitioner's loss of standing *as alleged by* FCC-D.

[5] The FCC-D and FCC-S are aware that this is a "receivership *pendente lite*" for temporary holding of the assets for receivership estates of the FCC licensee entities involved, as is shown in the public court records of the receivership. Also, no evidentiary hearings have been held in the receivership case.

The Falsely Asserted "Gag Order" - and Even if Correctly Asserted, its Invalidity under US Supreme Court holdings, and Impermissible FCC Meddling in a non-FCC legal proceeding

First, see above on *WOW v Johnson*. Second: In the Order, the FCC-D ~~Bureau~~ cites to the *initial* Receivership Order's "gag" order on Havens, in support of its argument that Havens has no standing or interest in the matter; that he is restrained from addressing the FCC about the receivership entities or their FCC licenses. At footnote 38~~, the Bureau writes~~:

> The Receiver is now the sole authorized representative before the Commission of the entities formerly controlled by Havens, and Havens individually has no standing to assert duplicative interests. The order appointing the Receiver prohibited Havens from, inter alia , acting on behalf of any of the receivership entities or "[c]ommunicating with the FCC regarding the FCC Licenses or the Receivership Entities." Receivership Order at 5, para. 28(d).

The FCC-D ~~Bureau~~ refers to the *initial* receivership order's "gag" order, but fails to acknowledge that it was modified later and then address by the ~~CA~~ California Court of Appeals decision which granted Havens' ~~Habeas~~ writ petition, overturning the lower court's contempt order against ~~of~~ Havens for making certain filings with the FCC. The Court of Appeals writ decision ~~Order~~ makes ~~it~~ clear that Havens can address the FCC as long as he makes it clear it is for himself (See Exhibit B that contains a copy of the Court of Appeals decision ~~Order~~ and related receivership-court decisions). The fact the FCC-D ~~Bureau~~ cites to this improper "gag" order on Havens' First Amendment, Communication-Act, and Due Process rights shows that it is failing to uphold Havens' basic federal-law Constitutional Rights, including ~~to~~ by Due Process violations for not having acted on ~~the~~ Havens's appeals of the Sippel Order for almost 3 years, while a temporary state-law receivership allegedly based on it takes over federal-law FCC-licensees and their businesses in which he is the majority owner.

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Standing and Interest: Petitioners Demonstrated
Standing Under Applicable Facts and Authorities Shown,
and the Decision Creates Additional Bases of Standing

The Petitions gave ample reasons under law why Petitioners have standing and interest to file their respective petitions. Petitioners do not reiterate those sections of the Petitions here again. The FCC-D's Order erred in finding that Petitioners do not have standing.

The Order (also called the "Decision") failed to squarely address the Petitions' specific showings of standing and interest, including the Petition's referenced and incorporated "MOTION FOR DECLATORY RULING REGARDING STANDING EXPEDITED ACTION REQUESTED" filed concurrently with the Petition, that was attached as Exhibit 1 to the Petition (the "MDR"). The Order failed to squarely address the MDR's specific arguments, cited case precedents, and showings regarding why Petitioners have standing under applicable law. Instead, the Order reiterates the same arguments on standing that it has been making since the receivership was entered due to the Sippel Order. Reiterating the same position is not addressing Petitioners' substantive arguments and precedents supporting their standing. As such, the Bureau should do so on reconsideration.

Petitioners also maintain they have legal standing in this matter with respect the 2010 and 2015 petitions because the Order addressed the substance of those and denied them pursuant to its prior decision, rather than dismissing them, based on a "public-interest" rationale.

In addition, Petitioners have rights to challenge the Order, just as the FCC allowed Paging Systems, Inc. to challenge the Havens- managed two AMTS licensees auction 57 results, where Paging System's first challenge was found to lack standing, but the FCC still addressed the substance, and then allowed and addressed the PSI challenges ~~d~~ of that decision a number of times further before the FCC – all also under a "public interest" rationale.

~~Also~~ Likewise, Petitioners, as persons among the interested "public" in the "public interest" ~~to~~ may challenge under the "public interest" standard. "Public Interest" is not same as private interests in ~~the~~ commonly asserted "Article III" legal standing analysis.

Reference and Incorporation

With respect to the Order's denial of the Havens 2010 and 2015 petitions to deny, Petitioners refer to their February 6, 2017 Petition for Reconsideration of Order, DA 17-26. For the same reasons given in that pending petition for reconsideration, the Order erred in denying the 2010 and 2015 petitions to deny and should be reconsidered and overturned. It is more efficient for all parties for Petitioners to refer to their pending appeal, since it is already pending before the FCC and deals with the same issues, rather than reiterate those arguments again here (~~just~~ as the FCC-D ~~Bureau~~ did in the Order at paragraph 13 by referring to its prior decision).

The Decision Did Not Address Major
Substantive Challenge Components:
These Should Be Addressed on Reconsideration

The Order failed to squarely address the defects of the applications discussed in Petitioners' Petition at its pages 7-14 under its section "Defects in the Applications". Those included, but were not limited to the following, which should be read with the next section below:

(1) That Section 309(d) of the Communications Act required that the FCC put any new applications with Choctaw listed as assignor instead of MCLM on Public Notice. The Order fails to explain how the FCC can entirely ignore the requirements of Section 309(d) solely because of its "Second Thursday" decision. By doing so, the FCC is changing rule requirements without a proper rulemaking proceeding, which as the Petition argued, makes the FCC's actions *ultra vires* and *void ab initio*.

(2) The FCC's rules, including Section 1.948, do not provide for simply switching out one assignor entity with another assignor entity on assignment applications, and there was no rulemaking by the FCC to change Section 1.948 to allow the FCC to do what it did. The Order

states at paragraph 16, "Moreover, any such injury is not direct, let alone actual; Havens and Polaris do not explain how it would be redressed by dismissing the assignment applications and requiring Choctaw to file applications proposing to assign the same spectrum to the same parties." However, the FCC has rules that have to be followed, regardless of whether or not the end result may be the same at the end of the day in the FCC's opinion. In its decisions dismissing Havens' site-based applications for AMTS waterways, where Havens served all of the waterway he could, but not the required total percentage of the waterway, the FCC consistently stated that strict application of its rules may be harsh at times, but it has to follow its rules. In the case of MCLM and Choctaw, it has taken the opposite position to the extreme, and continues a pattern of waiving its rules and their requirements, without granting any formal waivers, to continue to allow MCLM (and now its predecessor Choctaw, which is made up of investors in MCLM) to keep AMTS licenses, and to sell them, that were either won by clear cheating at auction, or kept by fraud (e.g. as shown in FCC records and docket No. 11-71, keeping stations that were not in operation for up to 7 years or more and stating that their records were destroyed, etc.)

(3) That FCC precedent, Letter, DA 06-2016, *21 FCC Rcd 11711* (*Fatima Response, Inc*) required Choctaw to file new applications—the Order entirely ignores addressing this precedent and therefore it must address and reconcile its current decision with that past precedent, and any other precedents that conflict with the Order.

(4) That the improperly altered Applications are defective on their face because they do not contain the correct signature dates or proper and current certification statements by the assignore and assignee parties, because, as is obvious, they were originally submitted by MCLM and the assignee parties many years ago, and not newly by Choctaw and the assignee parties. Therefore, the Bureau cannot simply substitute Choctaw for MCLM on the Applications because the Applications' certifications, signature dates, and other details were at the date originally

submitted and not by the current parties (the assignee parties' ceritifcations, qualifications and other information may now be different, and Choctaw is clearly a new assignor entity).

(5) That the Order did not comply with the Bankruptcy Court Orders and Chapter 11 Plan, which required FCC rules to be followed and that required first Choctaw to obtain the licenses and then to take actions with them, such as assignments.

(6) Ex Parte Issues: At its pages 10-11, the Petition argued that the FCC and Choctaw and MCLM must have engaged in prohibited *ex parte* communications, because the FCC made "internal corrections" to the Applications and otherwise, must have been discussing with Choctaw and MCLM and others substitution of Choctaw on the Applications and other relevant changes or non-changes to the Applications. The Order did not address or squarely address these and they should be addressed on reconsideration. If said communications were not impermissible *ex parte*, then the FCC did not have to address the Petitions at all.

The Order's "Second Thursday" Rational is Not Valid

The Order's rationale, at its paragraph 10, to allegedly follow and support the Commission's December 2016 "Second Thursday" "doctrine" decision is not valid for several reasons. Initially, where a FCC delegated authority makes a decision to follow and support a preceding Commission decision, interpreting and applying it, and where that Commission decision is under pending challenge by the petitioners that are subject of the delegated authority decision, the petitioners may follow, support, and explain their pending challenge before the Commission in seeking reconsideration before the delegated authority. Petitioners do this below.

First: The Order contradicts the December 2016 Second Thursday decision since the Commission directed the Bureau (as it must under its Part 0 rules and the Communications Act) to proceed under its rules and the underlying "public interest," not to proceed contrary those, as if MCLM and Choctaw obtained or ~~is~~ are entitled to an open-ended waiver of the rules and the underlying public interest. Second: Petitioner's pending challenge to that Second Thursday

decision asserts that the Second Thursday doctrine -- (at least as it has come to be construed and asserted by the Commission and parties seeking relief under the doctrine) -- is an impermissible interpretative rule, on top of which the Commission's December 2016 "Second Thursday" decision is a greatly broadened and even more impermissible interpretive rule of the impermissible doctrine rule. Petitioners assert that Bureau action challenged by Petitioners, but supported in the Decision, is, at best, an invalid application of these invalid interpretive rules.

For example,[6] the following applies to both the above-noted Second Thursday Doctrine (based on a series of Commission and Delegated Authority decisions), and the expansion of it by the December 2016 Second Thursday decision, and also to the subject ~~Bureau~~ FCC-D Decision that that follows and support these preceding decisions:

> First, when an agency transposes a vague, general rule into specific criteria applicable to private parties, it is hard to qualify the action as anything but substantive rulemaking."[I]f the relevant statute or regulation 'consists of vague or vacuous terms—such as 'fair and equitable,' 'just and reasonable,' 'in the public interest,' and the like—the process of announcing propositions that specify applications of those terms is not ordinarily one of interpretation, because those terms in themselves do not supply substance from which the propositions can be derived.'" *Catholic Health*, 617 F.3d at 494–95 (citing Robert A. Anthony, "Interpretative" Rules, "Legislative" Rules, and "Spurious" Rules: Lifting the Smog, 8 Admin. L. J. Am. U. 1, 6 n.21 (1994))....However the agency may describe the exercise of that authority, it involves substantive rulemaking and requires notice and comment. *Hoctor*, 82 F.3d at 170–71.
> [….]
> In distinguishing rules with substantive legal effect from interpretative rules and statements of policy, courts of appeals have relied on an "impact on the agency" test. That test "turns on an agency's intention to bind itself to a particular legal policy decision." *U.S. Tel. Ass'n v.* ***FCC*****,** 28 F.3d 1232, 1234 (D.C. Cir. 1994); see *also Prof'ls and Patients for Customized Care v. Shalala,* 56 F.3d 592 (5th Cir. 1995).

Petitioners' position, again, is that the Second Thursday Doctrine, and the expansion of is by the December 2016 Second Thursday decision, are not permissible interpretive rulemaking but: "transposes a vague, general rule into specific criteria applicable to private parties […and thus are] substantive rulemaking. But they were not subject to the required rulemaking procedure

[6] The quoted text is from the "Brief Of Legal Scholars Ronald A. Cass And Christopher C. Demuth And The Judicial Education Project. Amici Curiae In Support Of Respondents," before the US Supreme Court in the case decided as *United States v. Texas,* 136 S. Ct. 2271 (2016).

starting with public notice and comment (among other fatal defects). Also from the above-cited amicus brief:

> Second, the APA commands that an agency engaged in rulemaking must give reasons for its actions. See *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983). That requirement helps to ensure that agencies act within the scope of their delegated authority, and it protects private parties' opportunity for meaningful judicial review. An "arbitrary choice among methods of implementation" may rest on compelling reasons; on considerations that may or may not pass an "arbitrary and capricious" examination; on no reason except administrative convenience; or even on considerations that are affirmatively foreclosed by an agency's organic statute. Cf. *Judulang v. Holder,* 132 S. Ct. 476, 483–84 (2011) ("[c]ourts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking"). [....]

Petitioners' position, again, is that the Commission did not give required reasons for its December 2016 Second Thursday decision (not did the Commission and FCC Bureaus' ever do so when the Second Thursday "doctrine" was pieced together over time into an impermissible rule (that, as noted above, is really an impermissible substantive rule in the guise of an interpretive rule).

In addition to the above analysis, an interpretive rule is invalid if it directly undermines or changes a substantive rule. That is also part of Petitioner's existing position regarding the Second Thursday Doctrine (as it has come to be) and its expansion in the December 2016 Second Thursday decision. Thus, the subject Bureau Order, that follows those is also invalid. Further, the Order is directly in violation of this principle: it undermines and effectively changes the applicable rules, as cited in the challenge Petition. That is further clear since there was no waiver granted. In further support of the preceding point (and as also already raised by Petitioners), see the following quoted text from: Sharkey, Catherine M. "The anti-deference pro-preemption paradox at the U.S. Supreme Court: the business community weighs in." In Case Western Reserve Law Review, Mar 22, 2017 (emphasis added):

> Sixteen years after writing the Auer decision, the late Justice Scalia, in *Decker*, railed against this doctrine of deference to agency interpretations of their own regulations, which he termed "a dangerous permission slip for the abrogation of power." (45) Elaborating further, Justice Scalia warned: "[w]hen the legislative and executive powers

are united in the same person ... there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." (46)
[….]

(45.) *Decker v. Nw. Envtl. Def. Ctr.,* 133 S. Ct. 1326, 1341 (2013) (Scalia, J., concurring in part and dissenting in part).
(46.) Id. (quoting Baron de Montesquieu, The Spirit of Laws 151-52 (Thomas Nugent trans., O. Piest ed. 1949) (1748)).

In *Talk America, Inc. v. Michigan Bell Telephone Co*., (76) Sprint Nextel and Comptel, two telecommunications corporations that benefited from a Federal Communication Commission interpretation, likewise argued for Auer deference. (76) In that case, Michigan Bell, a subsidiary of AT&T, challenged the Michigan Public Service Commission's interpretation of the Telecommunications Act as requiring incumbent local exchange carriers- like Michigan Bell--to give access to their equipment and services to competitive local exchange carriers at cost. (77) The Sixth Circuit Court of Appeals held that " Auer deference [is] unavailing ... because the [Federal Communication Commission's] proffered interpretation is so plainly erroneous or inconsistent with the regulation ... that we can only conclude that the FCC has attempted to create a new de facto regulation under the guise of interpreting the regulation." (78)

(76.) Brief for Sprint Nextel Corp. as Amicus Curiae Supporting Petitioners at 19, Talk Am., Inc., 564 U.S. 50 (Nos. 10-313, 10-329); Brief for Amicus Curiae Comptel in Support of Petitioners at 2-3, Talk Am., Inc., 564 U.S. 50 (Nos. 10-313, 10-329).
(77.) *Talk Am., Inc.,* 564 U.S. at 55.
(78.) *Mich. Bell Tel. Co. v. Covad Commc'ns Co.,* 597 F.3d 370, 375 n.6 (6th Cir. 2010). The U.S. Supreme Court reversed. The majority looked to the FCC's interpretation of its regulations to resolve the ambiguities in the statutory scheme, and deferred to that interpretation after finding it "reasonable." *Talk Am., Inc.,* 564 U.S. at 59-67. "[W]e defer to an agency's interpretation of its regulations, even in a legal brief, unless the interpretation is 'plainly erroneous or inconsistent with the regulation[s]' or there is any other 'reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.'" Id. at 59 (quoting *Auer v. Robbins,* 519 U.S. 452, 461-62 (1997)).

Conclusion

For the reasons given, this petition for reconsideration should be granted.

Respectfully submitted,

March 16, 2018,
/s/

Warren Havens
Warren Havens, an individual
Warren Havens, President, Polaris PNT PBC (a Delaware Public Benefit Corporation)
Contact information is on the Caption page. Email: wrrnvns@gmail.com[7]

[7] Call first to enable email to me.

Declaration

I, Warren Havens, declare under penalty of perjury that the foregoing filing was prepared pursuant to my direction and control and that the factual statements and representations therein known by me are true and correct.

/s/

_____

Warren Havens

March 16, 2018

EXHIBIT A

Filed 8/23/17 Leong v. Havens CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

ARNOLD LEONG, Plaintiff and Respondent, v. WARREN HAVENS, Defendant and Appellant.	A147027 (Alameda County Super. Ct. No. 2002-070640)

Arnold Leong and Warren Havens have been involved, for over 15 years, in contentious litigation regarding the ownership and control of two entities holding licenses issued by the Federal Communications Commission (FCC or the Commission). Twelve years after the action was compelled to arbitration, the trial court appointed a receiver for the assets and granted a preliminary injunction restraining Havens from interfering with the receivership (the Receivership Order). (See Code Civ. Proc., § 1281.8.)[1] Havens appeals from the Receivership Order, pressing a litany of complaints. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1999 and 2001, Leong and Haven entered into written limited liability company agreements establishing Verde Systems LLC (Verde) (formerly Telesaurus-VPC LLC)

[1] "A party to an arbitration agreement may file in the court in the county in which an arbitration proceeding is pending . . . an application for a provisional remedy in connection with an arbitrable controversy, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without provisional relief." (Code Civ. Proc., § 1281.8, subd. (b).)

and Telesaurus Holdings GB LLC (Telesaurus). The primary business of both Verde and Telesaurus is the acquisition and transfer of valuable radio spectrum licenses for the development of wireless networks.[2] According to the written limited liability company agreements (the LLC Agreements), Leong holds a 49.9 percent interest in each entity, while Havens owns the remaining 50.1 percent. The LLC Agreements also name Havens as "the initial" manager with "full and complete authority" to manage the entities' affairs.

Leong alleges he invested over a million dollars in the enterprise under an oral agreement that he and Havens would share ownership and control "50-50." Per the alleged agreement, Havens would only temporarily have sole management authority, to qualify for a FCC bidding discount, but Leong was to have an equal right of control in the near future. In 2001, Havens disavowed the existence of any such agreement. Thereafter, Leong maintains Havens excluded him from decision making and provided only extremely limited financial information.[3] And, despite the licenses yielding substantial returns on investment, Havens has not distributed any profit to Leong.

In 2002, Leong filed suit against Havens, seeking declaratory relief, dissolution, an accounting, and damages on breach of contract, fraud, and breach of fiduciary duty causes of action. In October 2003, Havens compelled Leong to arbitrate, pursuant to arbitration provisions contained in the LLC Agreements.[4] The LLC Agreements also contain a provision concerning choice of law, which reads in relevant part: "This Agreement and any and all disputes, controversies, claims, or differences . . . arising out

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[2] The FCC, acting pursuant to its authority created by the federal Communications Act of 1934 (FCA) (47 U.S.C. § 151 et seq.), regulates the right to obtain and use radio frequencies. It acts as the exclusive authority for the award and transfer of such licenses. (47 U.S.C. §§ 307, 309, 310(d).)

[3] The LLC Agreements require Havens, as manager, to provide Leong "within 120 days after the end of each Fiscal Year, an annual report containing a balance sheet as of the Fiscal Year end and an income statement."

[4] Despite being compelled to arbitration in 2003, the arbitration hearing began only in September 2015 and, at the time the appealed order was entered, had not yet concluded.

of, relating to, or having any connection with this Agreement (including any question relating to its existence, validity, interpretation, performance, or termination) shall (a) be governed by and construed in accordance with the [Delaware Limited Liability Company Act] and other laws of the State of Delaware applicable to contracts made or to be performed entirely within such state and without giving effect to any choice of law or similar principles that would lead to the selection of the law of another jurisdiction . . . ."

On April 22, 2015, in an administrative proceeding before the FCC in which Havens, Verde, and its wholly owned subsidiary Environmentel LLC (Environmentel) were parties, Administrative Law Judge Richard L. Sippel issued an order (the Sippel Order) finding that Havens, Verde, and Environmentel, had engaged in repeated "egregious" behavior before the Commission, including threatening members of the FCC staff, disregarding the ALJ's "clearly understandable" orders, ignoring deadlines, disregarding summary decision procedures, filing frivolous motions and interlocutory appeals, and making false or misleading statements. The ALJ found that Havens, Verde, and Environmentel "not only filed [a] Motion for Summary Decision in bad faith, but also engaged in patterns of egregious behavior that . . . warrant a separate proceeding in which several issues as to the character qualification of [Havens] and the [Havens companies] to hold Commission licenses are examined." The Sippel Order certified "such deliberate transgressions, together with an account of [Havens's] history of disruptive disregard of orders and otherwise contemptuous behavior, to the Commission for determination as to whether a separate proceeding should be designated to decide whether [Havens] and his companies qualify to hold [FCC] licenses." Following entry of the Sippel Order, Havens sought reconsideration and filed an interlocutory administrative appeal.

In May 2015, Leong responded to the Sippel Order by filing an ex parte application, in the Alameda County Superior Court, to appoint a receiver for Verde, Telesaurus, Environmentel, Environmentel 2 LLC (Environmentel-2), Intelligent Transportation and Monitoring Wireless LLC (Intelligent), Atlis Wireless LLC (Atlis), V2G LLC (V2G), and Skybridge Spectrum Foundation (Skybridge) (collectively, the

Receivership Entities)[5] and for entry of a temporary restraining order. Citing sections 564, subdivision (b)(9), and 1281.8, subdivision (b) of the Code of Civil Procedure, Leong argued a receivership was necessary to protect his valuable interests in the Receivership Entities and the FCC licenses. Leong contended the licenses were in "immediate jeopardy" if a receiver was not appointed immediately because the Sippel Order could trigger "a significant risk of imminent harm" due to limited transferability of the entities' FCC licenses in the event the FCC issued a "hearing designation order." Leong also insisted the Receivership Entities were "in imminent danger of insolvency" should they lose their licenses.

Havens initially opposed the receivership motion by arguing there was no emergency. He conceded that if a hearing designation order is entered, the entities would be unable to freely alienate their licenses thereafter, but insisted due process protections ensure the FCC will not " 'freeze' or prohibit[] the assignment or transfer of licenses for many months, if not years." He also asserted Leong was merely a competitor attempting to steal the licenses and that a receivership could work more harm than good.[6]

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[5] Environmentel and Environmentel-2 are wholly owned subsidiaries of Verde. Leong asserts an interest in Intelligent, Skybridge, Atlis, and V2G by virtue of a provision in the LLC Agreements giving him a right to a percentage of profits "attributable to the use of the Joint Licenses . . . by [Verde and Telesaurus] in its business, *including the business of subsidiaries and joint ventures*." (Italics added.) Havens, on the other hand, asserts Intelligent and V2G were "capitalized by [Havens] and various minority investors other than Leong." However, he concedes "Intelligent did borrow money from [Verde] and [Telesaurus]." Skybridge is a "charitable foundation created pursuant to section 501c of the Internal Revenue Code," which holds licenses donated by Telesaurus, Verde, Intelligent, Environmentel, and Environmentel-2. According to Havens, Atlis was created to collect revenue, pay expenses, and make necessary state and federal filings. Havens admits that, "to the extent [Atlis] holds money or other assets, it does so on behalf of the particular managed entity or entities to whom that money or those assets belong."

[6] At oral argument, Havens's counsel conceded Leong held no equity interest in any competitor of the Receivership Entities.

At a May 26, 2015 hearing on the motion, the Honorable Frank Roesch stated his inclination to appoint a receiver but took the matter under submission and ordered the parties to meet and confer regarding a proposed order. Before an order was entered, Havens removed the case to federal court on the theory it presents a FCC licensing dispute—purportedly triggering federal question jurisdiction. After finding the matter was "fundamentally a state court dispute" concerning only issues of business ownership and control, the federal district court remanded the matter to Alameda County Superior Court on an expedited basis.

On remand, Leong was granted leave to file his second amended complaint, which named six new parties (Environmentel, Environmentel-2, Intelligent, V2G, Atlis, and Skybridge) as Havens's alter egos.[7] The following causes of action were alleged against all defendants except Verde and Telesaurus: (1) fraud; (2) breach of contract (against Havens alone); (3) breach of fiduciary duty; (4) breach of the implied covenant of good faith and fair dealing; (5) unjust enrichment; and (6) minority shareholder suppression. Appointment of a receiver, dissolution, an accounting, and other equitable remedies were also sought.

Leong also renewed his motion for appointment of a receiver and issuance of a preliminary injunction, relying on Code of Civil Procedure sections 564, subdivisions (b)(1) and (b)(9), and 1281.8, subdivision (b).[8] Leong again asserted the Sippel Order remained a threat to his interests, in that the FCC could issue a hearing

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[7] Verde and Telesaurus had been previously added as parties to the arbitration without objection.

[8] Section 564, subdivision (b), provides in relevant part: "A receiver may be appointed by the court in which an action or proceeding is pending, or by a judge thereof, in the following cases: [¶] (1) In an action . . . between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured. [¶] . . . [¶] (9) In all other cases where necessary to preserve the property or rights of any party."

designation order at any time "to commence proceedings on Havens'[s] (and the [Receivership Entities']) qualifications to hold licenses." Leong asked the trial court to take judicial notice of certain FCC records, including the Sippel Order and the FCC Enforcement Bureau's opposition to Havens's motion for reconsideration.[9] Leong also presented alternative evidence of gross mismanagement, in the form of declarations, showing Havens's failure to prepare and provide annual reporting of financial information and Havens's assignment or donation of licenses owned by Verde and Telesaurus to the other Receivership Entities.

In his opposition, Havens maintained Delaware law "governs" the dispute but did not explicitly direct the trial court to the choice of law clause in the LLC Agreements or point out any relevant difference between California and Delaware law. Havens and the Receivership Entities again argued the Sippel Order did not constitute an emergency, that appointment of a receiver would be risky because Havens possesses unique business acumen, and that, because Havens would retain equitable ownership interest, appointment of a receiver would not necessarily insulate the licenses from revocation. Havens also asserted a receiver should not be appointed until after the arbitrator decided Leong's disputed ownership claims.[10]

At an August 11, 2015 hearing, the motion for appointment of a receiver was granted, but formal entry of the order was delayed until October 5, 2015. The court explained, "If the arbitration has been completed before that time or if the parties agree to do something differently, I would consider a request to reverse course and not issue that order." On October 1, 2015, the arbitration remained ongoing and the proposed date of entry of the order was continued.

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[9] The trial court did not explicitly rule on Leong's request for judicial notice, but we, like the parties, rely on these records as matters properly judicially noticed. (Evid. Code, § 452, subd. (c), 459, subd. (a).)

[10] Havens stated his position in the arbitration is that Leong, "by virtue of his improper conduct, had lost any ownership interest he may have had in any entity and simply is a creditor to the extent of the very limited monies he lent Havens."

The Receivership Order was ultimately entered on November 16, 2015. Susan Uecker was appointed receiver to "take control and possession of all property and assets of [the Receivership Entities]; as well as all FCC licenses owned or controlled by [Havens] as an individual." The Receivership Order also granted a preliminary injunction, which required Havens to turn over the Receivership Entities' property and assets as well as restrained Havens from, among other things, "interfering in any manner with the discharge of the receiver's duties under [the Receivership Order]" and "[c]ommencing, prosecuting, continuing to enforce, or enforcing any suit or proceeding in the name of the Receivership Entities . . . or otherwise acting on behalf of the Receivership Entities."[11]

After unsuccessfully seeking a stay of enforcement of the Receivership Order pending completion of the arbitration, Havens filed a timely notice of appeal from the Receivership Order. Both an order appointing a receiver and an order granting an injunction are appealable orders. (Code Civ. Proc., § 904.1, subds. (a)(6), (a)(7); *Alioto Fish Co. v. Alioto* (1994) 27 Cal.App.4th 1669, 1679.)[12]

II. DISCUSSION

We begin by dispelling a false premise underlying several of Havens's arguments on appeal. Despite conceding below that he would retain beneficial ownership of the licenses even after the appointment of a receiver, Havens now repeatedly asserts that Leong has "taken away" his property rights through the Receivership Order. A receiver

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[11] Certain amendments irrelevant to the issues on appeal were made to the Receivership Order on November 25, 2015.

[12] Leong has asked us to take judicial notice of events occurring after entry of the Receivership Order in support of the argument raised in his respondent's brief that Havens's appeal should be dismissed under the disentitlement doctrine. We initially deferred ruling on Leong's request for judicial notice, but we now grant the request, as to exhibit Nos. 5, 6, 20, and 21, and otherwise deny it. We also deny Havens's conditional request for judicial notice. Leong did not file a noticed motion to dismiss Havens's appeal under the disentitlement doctrine. Thus, the issue is not properly before us. (See *Halliburton Energy Services, Inc. v. Department of Transportation* (2013) 220 Cal.App.4th 87, 106; Cal. Rules of Court, rule 8.54.)

is a neutral party who holds the property for the benefit of all who have an interest therein. (6 Witkin, Cal. Procedure (5th ed. 2008) Provisional Remedies, § 419, p. 357.) "[A] receiver takes possession of all corporate property and assets and exercises complete control over all the affairs of the corporation including the management of its everyday business." (*In re Jamison Steel Corp.* (1958) 158 Cal.App.2d 27, 35.) However, "[t]he receiver is an agent and officer *of the court* and the property in her or his hands remains under the control and continuous supervision of the court." (*Gold v. Gold* (2003) 114 Cal.App.4th 791, 806, italics added.) As the " 'hand of the court,' " the receiver aids the court " 'in preserving and managing the property involved in the suit for the benefit of those to whom it may ultimately be determined to belong.' " (*Marsch v. Williams* (1994) 23 Cal.App.4th 238, 248.)

"The appointment of a receiver rests within the discretion of the trial court." (*Gold v. Gold, supra,* 114 Cal.App.4th at p. 807.) "The order appointing a receiver will be reversed on appeal if there is a clear showing of an abuse of discretion." (*Id.* at p. 808.) "However, such power is not entirely uncontrolled and must be exercised with due regard to the facts presented in each particular case." (*Alhambra-etc. Mines v. Alhambra G. Mine* (1953) 116 Cal.App.2d 869, 873.) "Where there is evidence that the plaintiff has at least a probable right or interest in the property sought to be placed in receivership and that the property is in danger of destruction, removal or misappropriation, the appointment of a receiver will not be disturbed on appeal." (*Sachs v. Killeen* (1958) 165 Cal.App.2d 205, 213.) Havens contends the trial court lacked jurisdiction to enter the Receivership Order or, in the alternative, erred by applying California law rather than Delaware law. Havens also contends the trial court abused its discretion by ignoring less intrusive remedies and attempting to coerce a settlement. Havens's arguments are unpersuasive.

A. *Jurisdiction to Enter Receivership Order*

Havens argues the trial court lacked jurisdiction to make the Receivership Order on two grounds—preemption under the FCA and interference with an ongoing

arbitration. First, we consider and reject Havens's argument the Receivership Order was void because it was issued by the trial court after arbitration had been compelled.

Arbitrators do not have the power to appoint a receiver. (*Marsch v. Williams, supra*, 23 Cal.App.4th at pp. 245–246.) Both section 1281.8 of the Code of Civil Procedure and the arbitration provisions of the LLC agreements expressly permit resort to California courts for interim equitable remedies. Pursuant to statute, parties to arbitration proceedings may apply to the superior court for provisional remedies if, in addition to the usual requirements for such remedies, an award to the petitioner "may be rendered ineffectual" without such relief. (Code Civ. Proc., § 1281.8, subd. (b); *California Retail Portfolio Fund GMBH & Co. v. Hopkins Real Estate Group* (2011) 193 Cal.App.4th 849, 853; accord, *Jordan-Lyon Productions, Ltd. v. Cineplex Odeon Corp*. (1994) 29 Cal.App.4th 1459, 1471.) "Those provisional remedies include appointment of receivers, writs of possession, temporary restraining orders, and preliminary injunctions." (*California Retail Portfolio Fund*, at p. 855; accord, Code Civ. Proc., § 1281.8, subd. (a).) The trial court had jurisdiction to grant provisional relief despite the ongoing arbitration.

Havens also contends the trial court had no jurisdiction to enter the Receivership Order because, if the *licenses* needed protection, Leong's only remedy was to proceed before the FCC which has exclusive jurisdiction to "decide who controls its licenses." Havens relies on section 310(d) of title 47 of the United States Code, which provides: "Assignment and transfer of construction permit or station license. No construction permit or station *license*, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby." (Italics added.) In fact, the Receivership Order fairly reconciles the trial court's own jurisdiction to appoint a receiver with the Commission's jurisdiction over licensing matters. (See *Radio Station WOW v. Johnson* (1945) 326 U.S. 120, 132 ["if the States' [laws] can be effectively respected while at the same time reasonable opportunity is afforded for the protection of

that public interest which [leads] to the granting of a license, the principal of fair accommodation between State and federal authority . . . should be observed"].) The Receivership Order recognizes and protects the powers of the FCC. It specifically provides: "As soon as possible, at her discretion, the Receiver shall execute and file with the [FCC] all notices, applications, reports or other documentation necessary to establish the Receiver's control over all FCC authorizations, permits, or licenses."

Havens fares no better under section 332(c)(3)(A) of the FCA, under which state and local governments are prohibited from regulating "the entry of or the rates charged by any commercial mobile service or any private mobile service, [but are not] prohibit[ed] from regulating the other terms and conditions of commercial mobile services." (47 U.S.C. § 332(c)(3)(A); *City of Huntington Beach v. Public Utilities Com.* (2013) 214 Cal.App.4th 566, 588.) Here, Havens does not persuasively explain how the Receivership Order "necessarily treads upon the federally-reserved areas" of rates and market entry. (*Fedor v. Cingular Wireless Corp*. (7th Cir. 2004) 355 F.3d 1069, 1072.). Instead, he makes a conclusory assertion that determination of the parties' disputed contractual rights constitutes regulation of market entry. The Receivership Order did *not* require resolution of the disputed contractual issue. The trial court merely decided the appointment of a receiver was appropriate in this case, where it is undisputed Leong has some interest in the Receivership Entities. In any event, we observe that the FCC itself has said, "contract questions are matters for the courts to decide under state and local law." (*In re Arecibo Radio Corp*. (F.C.C. 1985) 101 F.C.C.2d 545, 548.) Havens has not shown the trial court lacked jurisdiction to enter the Receivership Order.[13]

[13] The federal district court reached a similar conclusion in granting Leong's motion for remand. "Although not binding, a federal court's interpretation and application of federal preemption law, particularly in the same case, is entitled to substantial deference." (*Sciborski v. Pacific Bell Directory* (2012) 205 Cal.App.4th 1152, 1165.)

B. *Choice of Law*

Havens argues the trial court erred by applying California law, rather than Delaware law. We agree with Leong that Havens forfeited the issue by failing to adequately raise it in the trial court. In Havens's initial opposition to appointment of a receiver, he argued Delaware law and California law are identical on the appointment of a receiver. He also stated he was not conceding Delaware law applies. In subsequent opposition briefs to the renewed motion for appointment of a receiver, Havens maintained Delaware law "governs" the dispute but did not explicitly direct the trial court to the choice of law clause in the LLC Agreements or identify any relevant difference between California and Delaware law. Instead, appointment of a receiver was opposed under both California and Delaware law. Thus, it comes as no surprise that Havens cannot point to any choice of law ruling from the trial court and instead asserts we can infer a decision to apply California law from the Judicial Council form of the order.[14] Havens has forfeited any choice of law issue. (*Cable Connection, Inc. v. DIRECTV, Inc*. (2008) 44 Cal.4th 1334, 1350, fn. 12; *Pelletier v. Alameda Yacht Harbor* (1986) 188 Cal.App.3d 1551, 1554, fn. 1; *Danzig v. Jack Grynberg & Associates* (1984) 161 Cal.App.3d 1128, 1139 ["the law of the forum state applies unless a party litigant makes a *timely* request to invoke the law of a foreign state"].)

In any event, the requirements for imposing a receiver on a solvent entity appear to be substantively the same under Delaware and California law.[15] Under Delaware law, it is also established that appointment of a receiver lies within the sole discretion of the court. (*Drob v. National Memorial Park, Inc*. (Del. Ch. 1945) 41 A.2d 589, 597; *Velcut Co. v. United States Wrench Mfg. Co*. (Del.Ch. 1928) 140 A. 801, 802.) Where a corporation is solvent, the Delaware courts may still exercise equitable power to appoint

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[14] In objections Havens submitted to the trial court, he stated he had no objection to the use of "the Judicial Council form itself."

[15] Havens misses the mark by attempting to show a difference between Delaware and California receivership law for insolvent entities. Leong did not seek appointment of a receiver on the ground the Receivership Entities were insolvent.

a receiver, but must exercise this power with great restraint. (*In re Carlisle Etcetera LLC* (Del.Ch. 2015) 114 A.3d 592, 601; *Carlson v. Hallinan* (Del.Ch. 2006) 925 A.2d 506, 543, clarified on other grounds by *Carlson v. Hallinan* (Del.Ch. May 22, 2006) 2006 Del.Ch.Lexis 95; *Vale v. Atlantic Coast & Inland Corp.* (Del.Ch.1953) 99 A.2d 396, 400.) The Delaware courts will exercise this power to appoint a receiver " 'only upon a showing of gross mismanagement, positive misconduct by corporate officers, breach of trust, *or* extreme circumstances showing imminent danger of great loss to the corporation which, otherwise, cannot be prevented.' " (*Carlson*, at p. 543, italics added; accord, *Vale*, at p. 400.) "Appointing a receiver for a solvent corporation is a radical remedy and should only be taken when the petitioning party has 'rather plainly shown his entitlement to it.' " (*Seneca Investments LLC v. Tierney* (Del. Ch. 2008) 970 A.2d 259, 265.)

Under California law, " '[t]he power to appoint a receiver is a delicate one which is exercised sparingly and with caution, and only in an extreme case under such circumstances as demand or require summary relief, and never in a doubtful case or where there is no necessity or occasion for the appointment.' " (*Morand v. Superior Court* (1974) 38 Cal.App.3d 347, 350.) "It is said by the state's courts that the appointment of a receiver is 'an extraordinary and harsh,' and 'delicate,' and 'drastic,' remedy to be used 'cautiously and only where less onerous remedies would be inadequate or unavailable. . . .' [Citations.] And a party to an action should not be 'subjected to the onerous expense of a receiver, unless . . . his appointment is obviously necessary to the protection of the opposite party.' " (*Id.* at p. 351.)

Havens has not shown an abuse of discretion under either California law or Delaware law. Havens insists the trial court erred by appointing a receiver because revocation of the Receivership Entities' licenses was *not* imminent after the Sippel Order. Even if we assume that Havens is correct that imminent risk of harm is required under Delaware law (*Berwald v. Mission Development Co.* (Del. 1962) 185 A.2d 480, 482), Havens's argument fails. Havens argues there was no imminent risk of harm because revocation of the Receivership Entities' licenses would be possible only after a contested hearing before the full Commission (47 U.S.C. § 312; 5 U.S.C. §§ 554, 558), and that

"[n]o revocation hearing . . . could take place for a very long time." But under *Jefferson Radio Co. v. Federal Communications Com.* (D.C.Cir. 1964) 340 F.2d 781, a licensee is prohibited from transferring a license while a proceeding that might lead to license forfeiture is pending. (*Id.* at p. 783.) Thus, Leong is correct that the Receivership Entities' ability to freely transfer its licenses would be jeopardized if the FCC determined a qualifications hearing was justified. At the time the Receivership Order was entered, evidence showed a hearing designation order could issue at "any time" and would be catastrophic for the Receivership Entities.

To invoke the authority to appoint a receiver under Code of Civil Procedure section 564, subdivision (b)(1), the plaintiff must establish a "joint interest with [the] defendant in the property; that the same was in danger of being lost, removed or materially injured, and that plaintiff's right to possession was probable." (*Alhambra-etc. Mines v. Alhambra G. Mine, supra*, 116 Cal.App.2d at p. 873.) Although the parties vehemently disagree regarding Leong's precise ownership share, there is no legitimate conflict in the evidence.[16] Havens makes a wholly unsupported argument that Leong has *no* interest, but the record undisputedly shows Leong has a joint interest in Telesaurus and Verde. Leong also presented evidence showing he has a probable joint interest in the other Receivership Entities. Given Leong's probable interest in the Receivership Entities, we fail to see any abuse of discretion in the trial court's decision to appoint a receiver to protect Leong's interests from the danger they faced as a result of Havens's misconduct before the FCC.

Nor is Havens correct in asserting the only basis for certifying the qualifications issue to the Commission was ALJ Sippel's conclusion that a motion for summary decision was filed in disregard of prior orders.[17] Subdivision (f) of the federal regulation

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[16] Havens's insistence that due process entitles him to an evidentiary hearing to resolve conflicts in the evidence is wholly unsupported by any citation to the record showing the existence of such a conflict. Thus, we do not consider the argument further.

[17] Havens asserts this portion of the Sippel Order is unsupported and unlikely to withstand review.

governing summary decisions in FCC hearings (47 C.F.R. § 1.251 (2017)) provides, in relevant part: "The presiding officer may take any action deemed necessary to assure that summary decision procedures are not abused. He may rule in advance of a motion that the proceeding is not appropriate for summary decision, and may take such other measures as are necessary to prevent any unwarranted delay. [¶] . . . [¶] (3) If, on making such determination, the presiding officer concludes that the facts warrant a finding of bad faith on the part of a party to the proceeding, *he will certify the matter to the Commission*, with his findings and recommendations, *for a determination as to whether the facts warrant addition of an issue as to the character qualifications of that party*." (Italics added.) However, Havens cites no authority supporting the notion that this is the *only* avenue for the Commission to consider character qualifications. In fact, section 312(a) of title 47 of the United States Code provides: "The Commission may revoke any station license or construction permit—[¶] . . . [¶] (2) *because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application*; [¶] . . . [¶] (4) for willful or repeated violation of, or *willful or repeated failure to observe any provision of this Act or any rule or regulation of the Commission* authorized by this Act . . . ." (Italics added.) In the Sippel Order, the ALJ found numerous instances of misconduct that appear to satisfy these conditions—instances of misconduct that are entirely undisputed by Havens.

C. *Availability of Alternative Remedies*

Havens also claims less intrusive remedies were available and improperly rejected by the trial court. Specifically, he asserts the harm to be remedied by the Receivership Order could have been avoided by enjoining Havens from appearing pro se before the FCC. " '[T]he availability of other remedies does not, in and of itself, preclude the use of a receivership.' " (*Gold v. Gold, supra,* 114 Cal.App.4th at p. 807; *City and County of San Francisco v. Daley* (1993) 16 Cal.App.4th 734, 745.) "Rather, a trial court must consider the availability and efficacy of other remedies in determining whether to employ the extraordinary remedy of a receivership." (*Daley*, at p. 745.) The record before us shows that the trial court properly considered alternative remedies before exercising its

discretion to appoint a receiver. The Sippel Order itself recognized, "[Havens has] engag[ed] in contemptuous conduct even when represented by counsel. Several attorneys have represented [Havens] or the Havens companies in the course of this proceeding, but no one has successfully restrained [his] disruptive influence." We, like the trial court, are not persuaded an injunction alone would adequately protect Leong's interests.

D. *Settlement Coercion*

Finally, we reject Havens's contention the Receivership Order was an impermissible attempt to compel the parties to settle. "[W]hile the trial court may direct litigants to engage in settlement negotiations, it may not compel litigants to settle a case. [Citations.] It therefore follows that the trial court may not use the threat of sanctions . . . to coerce the parties to reach a settlement." (*Barrientos v. City of Los Angeles* (1994) 30 Cal.App.4th 63, 72 (*Barrientos*), fn. omitted.) Thus, it is improper for a court to use its power to impose monetary sanctions as a tool to coerce a settlement. (*Id.* at pp. 71–72; *Triplett v. Farmers Ins. Exchange* (1994) 24 Cal.App.4th 1415, 1423 (*Triplett*).)

Havens's reliance on the above authority is misplaced. Here, unlike in *Barrientos* or *Triplett*, the trial court did not impose any sanction on Havens or his counsel *because* he failed or refused to settle the underlying suit. (*Barrientos, supra,* 30 Cal.App.4th at p. 67, *Triplett, supra*, 24 Cal.App.4th at p. 1422.) Leong's motion for appointment of a receiver was granted on the merits. Havens primarily relies on Judge Roesch's statements at a hearing on October 1, 2015, when he had *already* granted the motion for appointment of a receiver but was informed the arbitration was still in process. Judge Roesch said, "What am I supposed to do? I try to get you people to settle—I mean, this case started 13 years ago. 13 years. And it was put into arbitration, [which is] a speedy and inexpensive dispute-resolution process. And here we are at 13 years later, and quite frankly, if you'd been in court, you would have been done at minimum eight years ago, probably even longer. But we have what we have. [¶] . . . And I'm taking the matter under submission."

We cannot fault the trial court for expressing dismay at the resources consumed by the parties' intractable dispute. Our review of the record does not show coercion by the

trial court. Rather, the trial court concluded the Receivership Order was supported by the facts and law and merely afforded the litigants a few weeks to resolve their issues before formal entry of the order.

III. DISPOSITION

The Receivership Order is affirmed. Leong shall recover his costs on appeal.

_____
BRUINIERS, J.

WE CONCUR:

_____
SIMONS, Acting P. J.

_____
NEEDHAM, J.

A147027

EXHIBIT B

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re WARREN HAVENS on Habeas Corpus.

A150411

Alameda County No. 2002070640

BY THE COURT:*

The alternative writ of mandate, having been complied with by respondent superior court's order of September 1, 2017, is discharged, and the petition and petitioner's counsel's motion to withdraw are hereby dismissed as moot. The stay previously issued by order dated January 31, 2017 is dissolved.

Date SEP - 5 2017 **Simons, J.**, Acting P.J.

* Before Simons, Acting P.J., Needham, J., and Bruiniers, J.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA- UNLIMITED JURISDICTION

ARNOLD LEONG,

Plaintiff,

v.

WARREN HAVENS, an individual, ENVIRONMENTEL LLC, ENVIRONMENTEL-2 LLC, INTELLIGENT TRANSPORTATION & MONITORING WIRELESS LLC, V2G LLC, ATLIS WIRELESS LLC, SKYBRIDGE SPECTRUM FOUNDATION, VERDE SYSTEMS LLC, TELESAURUS HOLDINGS GB, LLC, and DOES 1 through 30, inclusive,

Defendants.

Case No. 2002-070640

ORDER PARTIALLY VACATING CONTEMPT ORDER AND IMPOSING NEW PUNISHMENT

Date: September 01, 2017
Time: 3:00 p.m.
Dept.: 20

RESERVATION NO. C-1880492

On September 1, 2017 at 3:00 pm in Department 20 of the above-titled Court, located at located at 1221 Oak Street, Oakland, CA, 94612, the Court held a further hearing pursuant to its order entitled *Order Setting Hearing and Briefing Schedule re: Alternative Writ of Prohibition* (the "Order"). Appearances were as stated on the record.

The Court, having considered the Alternative Writ of Prohibition and Order Issuing Alternative Writ of Prohibition issued by the Court of Appeal dated August 3, 2017, the papers filed in response to the Order, the argument of unrepresented parties and of counsel, the records of the Court and good cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. This Court's finding in its order of December 14, 2016 ("Contempt Order") that defendant Havens' September 2, 2016 filing to the Federal Communications Commission violated a court order is VACATED;

2. The Court also VACATES the punishment imposed in the Contempt Order and imposes the following punishment on the remaining count of contempt: a fine of $1,000 payable to the Court and a sentence of five (5) days in the Alameda County jail;

3. The Court also VACATES its prior award of fees and costs to the Receiver and now awards the Receiver $28,555 in fees and costs;

4. Havens has not fulfilled the mitigation steps identified in paragraph 33 of its December 14, 2016 order. Upon the dissolution of the stay issued by the Court of Appeal, the punishment of Havens will not be stayed;

4. Havens is ordered to appear personally in Dept. 20 of this Court on 11/29, 2017 at 3:00 PM and be prepared on that date and at that time to surrender to the Alameda County Sheriff's office; and,

5. The Clerk of Court is directed to serve endorsed filed copies of this Order on Mr. Havens and counsel of record with proof of service.

IT IS SO ORDERED.

DATED: 9/1/2017

Paul D. Herbert

Paul D. Herbert
JUDGE OF THE SUPERIOR COURT

Superior Court of California, County of Alameda
Department 20, Administration Building

Case Number: 2002-070640
Case Name: Arnold Leong VS Warren Havens

RE: ORDER PARTIALLY VACATING CONTEMPT ORDER AND IMPOSING NEW PUNISHMENT

DECLARATION OF SERVICE

I certify that I am not a party to this cause and that a true and correct copy of the foregoing document was hand-delivered to the parties in this action in open court (Dept. 20) on the date shown below, and that the delivery of the foregoing and execution of this certificate occurred at 1221 Oak Street, Oakland, California.

I further certify that a true and correct copy of the foregoing document was mailed first class, postage prepaid, in a sealed envelope, addressed as shown at the bottom of this document, and that the mailing of the foregoing and execution of this certificate occurred at 1221 Oak Street, Oakland, California.

I further certify that a true and correct copy of the foregoing document was served electronically pursuant to Certificate of Service, to the email addresses listed below, entered in this proceeding on August 31, 2017, via filing at the Clerk's Office. Execution of this certificate occurred at 1221 Oak Street, Oakland, California.

Executed on September 1, 2017

Executive Officer/Clerk of the Superior Court
By
Deputy Clerk Christopher Wright

David DeGroot
DDeGroot@Sheppardmullin.com
Counsel for Susan Uecker, Receiver

Richard Osman
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Richard Osman
2749 Hyde Street
San Francisco, CA 94109

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

WARREN HAVENS,

Petitioner,

v.

SUPERIOR COURT FOR THE COUNTY OF ALAMEDA,

Respondent;

SUSAN UECKER,

Real Party in Interest.

A150411

Alameda No. 2002070640

ORDER ISSUING ALTERNATIVE WRIT OF PROHIBITION

BY THE COURT:*

The court has conducted a detailed review of the record and the parties' briefing regarding this petition.

"In a contempt proceeding resulting in punitive sanctions . . . , guilt must be established beyond a reasonable doubt. [Citation.] A reviewing court will uphold a contempt judgment only if there is substantial evidence to sustain the jurisdiction of the trial court." (*Mitchell v. Superior Court* (1989) 49 Cal.3d 1230, 1256.) "In the review of a contempt proceeding 'the evidence, the findings, and the judgment are all to be strictly

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* Before Simons, Acting P.J., Needham, J., and Bruiniers, J.

construed in favor of the accused [citation], and no intendments or presumptions can be indulged in aid of their sufficiency. [Citation.] If the record of the proceedings, reviewed in the light of the foregoing rules, fails to show affirmatively upon its face the existence of all the necessary facts upon which jurisdiction depended, the order must be annulled.' [Citation.]" (*Ibid.*, italics omitted.) "A finding of indirect contempt . . . must be based upon a clear, specific, and unequivocal order." (*In re Marcus* (2006) 138 Cal.App.4th 1009, 1016.) " 'Any ambiguity in a decree or order must be resolved in favor of an alleged contemnor.' " (*Id.* at p. 1015.)

Respondent superior court erred when it found petitioner's September 2, 2016 submission to the Federal Communications Commission (FCC) violated a court order. The superior court's November 16, 2015 order prohibited petitioner from "[c]ommunicating with the FCC regarding the FCC Licenses or the Receivership Entities." That order was "clarifi[ed]" by the superior court's July 11, 2016 order prohibiting petitioner from communicating "in a manner that might lead to the recipient of the communication to infer that the communication from [petitioner] may be on behalf of any Receivership Entity." This court, having reviewed the record concerning respondent superior court's July 11, 2016 order, determines that the most reasonable construction of respondent's orders is that petitioner was permitted to communicate with the FCC as long as he clearly indicated he was not speaking on behalf of any Receivership Entity. Consequently, the contempt adjudication as to this count appears erroneous under the foregoing standards, because substantial evidence does not exist to sustain this contempt finding.[1]

Therefore, let an alternative writ of prohibition issue prohibiting respondent Alameda County Superior Court from taking any further action on the December 14, 2016 "Order Holding Warren Havens in Contempt for Failure to Comply with Court Orders," in *Arnold Leong v. Warren Havens, et al.*, Case No. 2002-070640, other than to vacate the finding that petitioner's September 2, 2016 filing to the FCC violated a court order, and to impose a new punishment excluding this contempt finding; or, in the alternative, to appear and show cause before Division Five of this Court why a peremptory writ of prohibition should not issue.

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[1] In light of this court's conclusion concerning this contempt count, it is unnecessary to reach petitioner's other challenges to that count. Additionally, the court has considered petitioner's challenge to the remaining contempt count and concludes it does not appear petitioner has persuasively demonstrated an entitlement to writ relief regarding that count. Therefore, this alternative writ does not extend to that claim.

If respondent superior court complies with this court's directives as set forth above, and does so on or before September 5, 2017, the court will dissolve the stay previously imposed, discharge the alternative writ, and dismiss the petition as moot.

This court requests that respondent superior court inform this court of its decision as soon as possible, and provide this court with copies of any new orders issued by respondent.

Should respondent court choose not to follow the above procedure, but instead to appear and show cause before this court why a peremptory writ of prohibition should not issue, this matter will be heard before Division Five when ordered on calendar.

The alternative writ is to be issued, served and filed on or before August 4, 2017, and shall be deemed served upon mailing by the clerk of this court of certified copies of the alternative writ and this order to all parties and to respondent superior court.

A written return to the alternative writ shall be served and filed on or before September 20, 2017, and a reply to the return shall be served and filed on or before October 5, 2017. (Cal. Rules of Court, rule 8.487(b).) If, however, respondent superior court complies with the alternative writ, and proof thereof is filed herein on or before those dates, then no return or reply need be filed.

Date AUG - 3 2017 **Simons, J.** Acting P.J.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

WARREN HAVENS,

Petitioner,

v.

SUPERIOR COURT FOR THE COUNTY OF ALAMEDA,

Respondent;

SUSAN UECKER,

Real Party in Interest.

A150411

Alameda No. 2002070640

ALTERNATIVE WRIT OF PROHIBITION

To the Superior Court of the State of California, in and for the County of Alameda, Greetings:

The petition for writ of habeas/certiorari/prohibition on file herein having been considered and good cause appearing for the issuance of this alternative writ of prohibition,

WE COMMAND YOU, forthwith upon receipt of this writ to either:

(a) Take no further action on the December 14, 2016 "Order Holding Warren Havens in Contempt for Failure to Comply with Court Orders," in *Arnold Leong v. Warren Havens, et al.*, Case No. 2002-070640, other than to vacate the finding that petitioner's September 2, 2016 filing to the Federal Communications Commission violated a court order, and to impose a new punishment excluding this contempt finding; OR;

(b) In the alternative, show cause before this court when ordered on calendar, why a peremptory writ of prohibition should not issue.

Respondent court shall make a decision whether to comply with the directive of paragraph (a) on or before September 5, 2017. If respondent court chooses to comply, the stay will be dissolved, the alternative writ will be discharged and the petition will be dismissed as moot. If respondent court instead elects to show cause, the matter will be heard when ordered on calendar.

This court requests that respondent superior court inform this court of its decision as soon as possible, and provide this court with copies of any new orders issued by respondent.

Witness the Honorable Mark B. Simons, Acting Presiding Justice of the Court of Appeal of the State of California, First Appellate District, Division Five.

Attest my hand and the Seal of this Court this 3rd day of August, 2017.

DIANA HERBERT
Clerk of the Court

By: A. Reasoner
Ann Reasoner
Deputy Clerk

I, DIANA HERBERT, CLERK OF THE COURT OF APPEALS STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DO HEREBY CERTIFY THAT THIS PRECEDING AND ANNEXED IS A TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN MY OFFICE.

WITNESS MY HAND AND THE SEAL OF THE COURT THIS 3rd DAY OF August 2017

DIANA HERBERT CLERK
BY A. Reasoner DEPUTY

Certificate of Filing and Service[*]

I, Warren C. Havens, certify that I have, on March 16, 2018:[*]

(1) Caused to be served, by placing into the USPS mail system with first-class postage affixed unless otherwise noted below, a copy of the foregoing filing, including any exhibits or attachments, to the following (Note: most of the addresses used for Assignees below are the assignee contact information off of the Applications on FCC ULS):

Robert J. Keller
Law Offices of Robert J. Keller, P.C.
P.O. Box 33428
Washington, DC 20033-0428
(Counsel to MCLM/ MCLM DIP)

Wilkinson Barker Knauer, LLP
ATTN Mary N. O'Connor
1800 M Street, NW, Suite 800N
Washington, DC 20036
(Counsel to Choctaw)

Keller and Heckman LLP
Wayne V Black , Esq
1001 G Street NW Suite 500 West
Washington, DC 20001

Duquesne Light Company
Lee Pillar
ATTN Lee Pillar
2839 New Beaver Avenue
Pittsburgh, PA 15233

Enbridge Energy Company, Inc.
ATTN Telecom
1001 G Street NW, Suite 500 West
Washington, DC 20001

Dixie Electric Membership Corporation, Inc.
ATTN John Vranic
P.O. Box 15659
Baton Rouge, LA 70895

[*] This errata copy is filed and served on March 17, 2018.

[*] The mailed service copies being placed into a USPS drop-box today may be after business hours and thus may not be processed and postmarked by the USPS until the next business day.

Keller and Heckman LLP
Jack B Richards , Esq
ATTN Telecom
1001 G Street NW, Suite 500 West
Washington, DC 20001

Shenandoah Valley Electric Cooperative
Ron Shickel
ATTN Myron D. Rummel, President & CEO
147 Dinkel Avenue
Mount Crawford, VA 22841

Rappahannock Electric Cooperative
ATTN Gary P. Schwartz
P.O. Box PO Box 7388
Fredericksburg, VA 22404

(2) Caused to be filed the foregoing filing as stated on the caption page, and thus, as I have been instructed, [**] provide notice and service to any party that has or may seek to participate in dockets 13-85 and 11-71 that extend to this filing.

/s/

_____

Warren Havens

[**] The FCC Office of General Counsel informed me regarding others' filings concerning MCLM relief proceedings that I was served in this fashion. I assume OGC does not apply a different standard to others. If OGC has a different standard, it can make that clear and public.